U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 April 2004

Case No: 2002-ERA-27

In the Matter of

RHONDA L. INGRAM

Complainant

v.

SHELLY & SANDS, INCORPORATED

Respondent

APPEARANCES:

Rhonda L. Ingram, Pro Se[1]
Indianapolis, Indiana
For Complainant

James D. Masur, II, Esq.
LOCKE REYNOLDS, LLP
Indianapolis, Indiana
For Respondent

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

Recommended Decision and Order

This case arises out of a complaint of discrimination filed pursuant to Section 211 of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851 *et. seq.* The ERA affords protection from employment discrimination for employees of

[1] At a prior hearing held on January 7, 2002, I urged Ms. Ingram to seek the assistance of counsel. Ms. Ingram stated at the December 18, 2003 hearing that she was unable to obtain attorney representation.

Nuclear Regulatory Commission (NRC) licensees who engage in activity that effectuates the purpose of the ERA or the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011, et. seq. Specifically, the law protects "whistleblower" employees from retaliatory or discriminatory actions by the employer. 42 U.S.C. § 5851(a)(1).

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes and case law. They are also based upon my observation of the demeanor of the witnesses who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered.

References to "CX" and "RX" refer to the exhibits of the Complainant and Respondent respectively. "ALJX" refers to Administrative Law Judge Exhibits. The transcript for the hearing is cited as "Tr." and by page number.

POSITIONS OF THE PARTIES

Rhonda L. Ingram (hereinafter "Complainant" or "Ingram") contends that a report she made to the Nuclear Regulatory Commission (NRC) in December of 2000 was protected activity under Section 211 of the Energy Reorganization Act, 42 U.S.C. § 5851 *et. seq.* She also argues that Respondent discriminated against her for engaging in this protected activity by refusing to rehire her in April of 2001.

It is the position of Shelly & Sands, Inc. (hereinafter "Respondent" or SSI) that Complainant did not engage in protected activity. Respondent also contends that Complainant did not suffer an adverse employment action. If Complainant's activities are found to be protected and that she suffered an adverse employment action, Respondent asserts that no nexus exists between the protected activity and the adverse employment action.

PROCEDURAL HISTORY

Ingram filed her complaint of discrimination on October 15, 2001. (ALJX 12). On October 31, 2001, she received an initial Notice of Determination from Kenneth Gilbert, Area Director of the Occupational Safety and Health Administration (OSHA) in

Indianapolis, informing her that her claim was denied. The letter stated that an appeal should be made within fifteen days to the OSHA Director of Compliance Programs in Washington, DC. On October 31, 2001, Ingram drafted an appeal letter to Richard Fairfax, Director of Compliance Programs, and mailed the letter on November 1, 2001, as evidenced by the postmark. Ingram mailed a copy of the appeal letter to the OSHA Regional Administrator in Chicago, as directed in the letter from Gilbert, also on November 1, 2001. The record reveals that the OSHA Regional Administrator in Chicago received Complainant's appeal on November 8, 2001. Despite Complainant's timely mailing of the appeal to the Director of Compliance Programs in Washington, DC, the letter was not received by Fairfax until February 22, 2002. A possible explanation for this lengthy delay is that during this time the anthrax mailing scares were occurring and new procedures were enacted to counter this threat.

On February 26, 2002, Complainant received a letter from Fairfax, the Director of Compliance Programs, informing her that her appeal request had been received and that an investigation would be taking place. (ALJX 12). The record contains a memorandum dated May 14, 2002 from John R. Spear, Director of Office of Investigative Assistance, to Fairfax. The memorandum states that Ingram was instructed to file her appeal in the incorrect forum and that her claim should be returned to the Indianapolis OSHA office to dismiss the claim. On May 14, 2002, Fairfax sent a letter to Complainant explaining that her appeal had been filed in the wrong forum and that her claim would return to the Indianapolis OSHA office for dismissal.

Complainant received her second Notice of Determination dismissing her claim on June 4, 2002. (ALJX 12). This time OSHA gave Complainant the correct appeal instructions. Complainant was instructed to appeal to the Office of Administrative Law Judges (OALJ) within five days of the receipt of the letter. On June 4, 2002, Complainant faxed her notice of appeal to the OALJ. A hearing was held on December 18, 2003 in Indianapolis, Indiana.

ISSUES

1. Whether Complainant filed a timely complaint;

2. Whether Complainant's appeal of the Occupational Safety and Health Administration determination to the Office of Administrative Law Judges was timely perfected;

3. Whether the Doctrine of Equitable Tolling is applicable to the appeal period from the date of October 20, 2001, which was the date of the first determination notice, to the date of the appeal to the Office of Administrative Law Judges on June 4, 2002;

4. Whether Complainant engaged in protected activity;

5. Whether Respondent violated 42 U.S.C. §5851 by discharging, disciplining or discriminating against Complainant for engaging in protected activity;

6. Whether Complainant was terminated by Respondent in retaliation for contacting the Nuclear Regulatory Commission; and

7. Whether Complainant is entitled to relief under the Employee Protection Provisions of the ERA.

CREDIBILITY FINDINGS

I have carefully considered and evaluated the rationality and internal consistency of the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative, and available evidence, while analyzing and assessing its cumulative impact on the record. *See, e.g., Frady v. Tennessee Valley Authority*, 92-ERA-19 at 4 (Sec'y Oct. 23, 1995)(citing *Dobrowolsky v. Califano*, 606 F.2d 403, 409-10 (3d Cir. 1979)); *Indiana Metal Products v. National Labor Relations Board*, 442 F.2d 46, 52 (7th Cir. 1971). An administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *See Altemose Constr. Co. v. National Labor Relations Board*, 514 F.2d 8, 15 n. 5 (3d Cir. 1975).

I have based my credibility findings on a review of the entire testimonial record and associated exhibits with regard for the reasonableness of the testimony in light of all record evidence and the demeanor of the witnesses. Probative weight has been given to the testimony of all witnesses found to be credible. The transcript of the hearing contains the testimony of eight witnesses.

I find the testimonies of Percy Bronson, Rick Hersberger, and DaNielle St. Clair all to be credible.

Robert Hebestreit has been employed by SSI and its subsidiary, Mar-Zane, for four years as a laboratory technician. (Tr. 135). I found him to be an entirely credible witness. His testimony regarding his personal knowledge of events pertinent to this claim was honest and thorough.

Matthew Kelley currently works for SSI as the Area Manager for Indiana. (Tr. 147). In the fall of 2000, he was an Operations Manager and the Project Manager for the project on which Complainant worked. I found his testimony to be honestly given.

Edward Morrison is the current Quality Control Manager and Radiation Safety Officer at Mar-Zane. (Tr. 82). In the fall of 2000, Morrison was the Quality Control Supervisor and Radiation Safety Officer at Mar-Zane. He testified as to Complainant's job performance and events pertaining to this claim. I found his testimony to be consistent and credible.

Harold A. Walton is employed by Mar-Zane as a Senior Lab Technician. (Tr. 117). He testified about his familiarity with the nuclear density gauge and the events surrounding Complainant's last few days on the job. I found his testimony to be very credible.

I find the testimony of Rhonda L. Ingram, Complainant, to be credible in some areas, but to be untruthful in others. Although Complainant may not have been able to recall the specific dates of the events of her claim, I find her accounting of the events surrounding the nuclear gauge incident to be consistent and honestly given overall. However, I find Ingram's testimony regarding contacts with personnel at SSI and Mar-Zane following her November 1, 2000 cessation of employment to be internally inconsistent and inconsistent with other evidence and testimony of record. Furthermore, Ingram's testimony is

inconsistent, in part, even with representations made in her initial complaint.

FINDINGS OF FACT

Background

Personnel records demonstrate that Complainant was hired by SSI as a laborer the week of June 17, 2000. (Tr. 157, EX 9).[2] SSI is a highway construction company with its corporate headquarters in Zanesville, Ohio. SSI is the parent company of Mar-Zane, Inc. (Mar-Zane), a wholly-owned subsidiary. (Tr. 81, 154, 157). Mar-Zane is also located in Zanesville, Ohio. (Tr. 82). Mar-Zane is the "asphalt division" of SSI and engages in the testing of asphalt mix and density testing of asphalt on roadways. (Tr. 82). Density testing on the roadways involves the use of a nuclear gauge. (Tr. 84). Licenses for the ownership and operation of nuclear gauges are obtained through the NRC. (Tr. 85). Mar-Zane has its licensure through its parent company, SSI.

Complainant has worked in the road construction industry for 12 years. (Tr. 31). She obtained a two-year degree from Ivy Tech in cement finishing and holds certificates in the use of a Troxler nuclear gauge, asbestos abatement and hazardous waste disposal and removal. She has the ability to use, and experience in using, a nuclear gauge to test the density of laid asphalt.

Ingram was initially hired as a laborer by SSI to work on a road construction project on Keystone Avenue in Indianapolis, Indiana. (Tr. 87). On this project, Ingram also engaged in some compaction testing with a nuclear gauge. For the Keystone Avenue project Ingram was employed by SSI and received her paychecks from that entity. (Tr. 157). In August of 2000, Ingram began work on the Interstate 65 project. For this project, Ingram's duties lay solely in density and compaction testing and she was employed by Mar-Zane. (Tr. 157). Ingram remained on the Interstate 65 project until November 1, 2000.

[2] Complainant testified that she began working for SSI in April of 2000, but was unsure of the date. However, I find the testimony of DaNielle St. Clair, the Safety Director and Workers' Compensation Administrator for SSI, to be more persuasive. St. Clair has access to the personnel records and her testimony is supported by documentation.

Nuclear Gauge

As new asphalt is laid on a roadway, it must be tested for density and compaction. This is accomplished in two ways. First, a six-inch core sample is taken using a drill machine. (Tr. 84). This sample is then taken from the worksite to a lab for testing. Only two core samples are taken per sublot. Second, the remainder of the sublot is tested for compaction and density through the use of a nuclear gauge. Proper density and compaction of asphalt will prevent "running and cracking" of the asphalt and erosion will be retarded. (Tr. 91).

The nuclear gauge is a device weighing between thirty and forty pounds and measuring approximately a foot wide and one and a half feet long. (Tr. 90). This instrument has a digital panel which allows the operator to program information regarding the type of asphalt mix that is being used and displays the resulting data from the compaction testing. When in use, the device is placed on the asphalt. A rod with a handle at the end is connected to the main box of the instrument. To utilize the gauge, the operator pushes down on the handle, opening a flap on the bottom of the device, which exposes the nuclear source to the pavement. (Tr. 118). This begins a timed reading of that section of the asphalt's percentage of compaction. (Tr. 119). After completion of the timed reading, a number is displayed which allows the operator to determine the compaction.

Technicians operating a nuclear gauge are required to wear a Dosimeter, which monitors radiation exposure. (Tr. 92, 143). After approximately three months of use, the Dosimeter is sent to a lab for analysis. The results of that analysis are maintained by SSI and Mar-Zane so that that information may be provided to the NRC or the Department of Health during an inspection. (Tr. 92).

A company must have a license issued by the NRC to employ the use of nuclear gauges in its business and must have a licensed person operate that equipment. 10 C.F.R. §31.5 (2003). The NRC regulations also require that damage to a nuclear gauge must be reported to the NRC under certain circumstances. 10 C.F.R. §20.2202 (2003). Generally, damage to a nuclear gauge must be reported if a person was exposed to a certain level of radiation or radioactive material was released into an area. 10 C.F.R. §20.2202(a)(1) and (2) (2003). The NRC requires that such incidents be reported "immediately." 10 C.F.R. §20.2202(a) (2003). NRC regulations also require the reporting of a lost or stolen nuclear gauge. 10 C.F.R. §20.2201 (2003).

SSI and its subsidiary Mar-Zane require that the nuclear gauge be kept secure when not in use. (Tr. 99). Morrison testified that a gauge is properly secured if it is in its case and locked in a toolbox attached to the bed of a truck or cabled to the truck bed. In addition, a gauge may be properly stored in the cab of a vehicle, if the cab is locked.

Nuclear Gauge Incident

In the late evening or early morning hours of July 12, 2000, Complainant was working on the Keystone Avenue project for SSI when a nuclear gauge received damage.[3] (Tr. 87). Complainant had been using the nuclear gauge on the job that day and had to return to a section of road to re-test it. (Tr. 38). The area was open to traffic and Ingram had to employ the truck she was driving and traffic cones to divert traffic around her. At some point, the nuclear gauge was run over by a passing car. Ingram knew that there was the potential of a radiation leak from a damaged nuclear gauge. She picked up the nuclear gauge, placed it in the truck and called a technician at the asphalt plant. Dan Patrick was the technician at the plant with whom Ingram spoke. He drove out to the worksite to retrieve the damaged gauge several hours after receiving the call. (Tr. 39, 87). Ingram testified that when Patrick arrived to take the nuclear gauge she informed him that the incident should be reported to the NRC immediately and that if Mar-Zane did not report the incident within 90 days that she would call in a report. (Tr. 41). Complainant stayed at the worksite and did not see that particular nuclear gauge again for several months.

After Patrick retrieved the nuclear gauge from the worksite, he took it to the asphalt plant and inspected it. He notified Edward Morrison, Quality Control Supervisor and Radiation Safety Officer, and Ron Morrison, Quality Control Manager, that the gauge was damaged but that the nuclear source was intact. (Tr. 88, 100). Although there appeared to be no danger of radiation leakage, the handle was damaged and needed to be repaired. (Tr. 142). Mar-Zane took the damaged equipment to Cline's Technical Service, located in Ohio, for repair. (Tr.

[3] Complainant testified that she believed the damage to the nuclear gauge occurred on August 13, 2000. (Tr. 38). However, the record contains other testimony establishing the date of the incident as July 12, 2000. I find that the record supports a finding that the incident occurred on July 12, 2000. The testimonies of Edward Morrison and Robert Hebestreit are more persuasive on establishing July 12, 2000 as the correct date. (Tr. 87, 140-43).

88). Robert Hebestreit, another lab technician, transported the damaged gauge to Huber Heights, Ohio, where he met a technician who would transport the gauge to Cline's Technical Service. (Tr. 88, 142). Hebestreit testified that he saw that the handle on the nuclear gauge was damaged but that the instrument was in "safe mode" and "there was no threat of danger." (Tr. 141). He believed that there was no need to report the incident to the NRC. (Tr. 141-42).

Cline's Technical Service repaired the nuclear gauge. (Tr. 88). Edward Morrison telephoned Willy Cline, the proprietor, to verify that the nuclear source was intact and that no report to the NRC was required. Cline assured Morrison that the nuclear source was intact and the instrument was in "safe mode." (Tr. 94). Cline told Morrison that Mar-Zane was not required to report the incident to the NRC. Had the damage caused a radiation leak, Mar-Zane would have been required to report the incident immediately to the NRC and notify persons who came in contact with the damaged gauge. (Tr. 95).

After the repairs were completed, the nuclear gauge was returned to use in the field. Ingram testified that she saw the gauge in September or October of 2000 and that she heard a "rattling" sound in the gauge. (Tr. 40). She was concerned that it had not been adequately repaired. On either December 4 or 7, 2000, Ingram reported the incident with the nuclear gauge to the NRC through its telephone reporting system. (Tr. 44).

Complainant's Work Performance

Ingram testified that prior to the incident when the nuclear gauge was damaged that there had been no complaints regarding her work performance. (Tr. 42). However, Robert Hebestreit, a laboratory technician with Mar-Zane, testified that he recalled times where Ingram could not be found on the job or was behind in her work. (Tr. 136-37). Matthew Kelley, Operations and Project Manager for SSI in Indiana, testified that he received complaints from foremen on work projects that Ingram was not around when she was needed. (Tr. 147-48). It was his understanding that there were instances in which Ingram was not taking core samples of the asphalt at the time they needed to be taken.

Edward Morrison testified that he was aware of two instances in which Ingram left the nuclear gauge in an insecure position. (Tr. 100). On both occasions, Edward Morrison was informed that Ingram had placed the nuclear gauge in the cab of

the truck, but that the truck was unlocked and the windows were down. Edward Morrison stated that this is a "serious violation of the NRC." (Tr. 100). Ron Morrison spoke with Ingram regarding the first incident. He explained that storing the gauge in the unlocked cab of the truck was unacceptable. Edward Morrison recalled that this incident occurred in mid-October of 2000.

The second incident occurred on October 31, 2000, when Harold A. Walton, a Senior Lab Technician with Mar-Zane, came on the Interstate 65 construction project and found the nuclear gauge in the cab of the truck, which was unlocked, windows were down and the keys were in the ignition. (Tr. 122). Walton was "alarmed" at the manner in which the gauge was temporarily stored. Walton encountered Ingram the next morning, November 1, 2000, at the asphalt plant and explained that the way in which the gauge had been stored was improper. (Tr. 123). Several hours later at the worksite, Walton received a call from Edward Morrison.[4] (Tr. 125). Walton reported that Ingram had left the nuclear gauge unsecured when she left work on Monday. Walton handed the telephone to Ingram, who was standing nearby at the worksite, so that Morrison could speak with her. Morrison reiterated the proper procedures for securing the nuclear gauge when not in use. (Tr. 102). Later in the day on November 1, 2000, Ingram had left the jobsite and returned the work truck to the place she had been parking it at the jobsite. (Tr. 128). Walton went to the truck to retrieve the nuclear gauge and noticed that it had again been left unsecured. He telephoned Morrison and reported the incident. (Tr. 102, 129).

Events of the Week of October 30, 2000

On Monday, October 30, 2000, Complainant was at the Interstate 65 worksite taking core samples of the asphalt. (Tr. 32). While trying to hook the trailer carrying the drill machine onto the truck, she injured her back. Ingram consulted a physician about this injury. (Tr. 33). She returned to work on Wednesday, November 1, 2000, although she had been advised to refrain from working because of the back injury. Ingram testified that she went to work that day, despite the pain,

[4] Walton's testimony is inconsistent regarding which day he informed Edward Morrison that Ingram had improperly secured the nuclear gauge. Initially, Walton testified that he telephoned Morrison as soon as he found the unsecured gauge on October 31, 2000. (Tr. 123). However, he later testified that he informed Morrison for the first time on November 1, 2000 when Morrison phoned him at the jobsite. Morrison's testimony does not clarify the date that Walton reported the incident to him; however, Morrison's testimony reveals that Walton did personally inform him of the event.

because she had been told that there was no one else at the site that could perform the density testing.

When Ingram arrived at the worksite, she testified that she was informed that a technician would be brought in from Zanesville to do her job and that she would be laid off that Friday. (Tr. 34). Ingram stated that she informed her supervisor that she was injured and that her physician recommended that she not work. She testified that she was in pain and upset and left the jobsite that day. Ingram testified that she left work because of her injury and that she was not laid off. (Tr. 37).

Edward Morrison testified that on November 1, 2000 he called Walton at the jobsite. (Tr. 101). Walton told Morrison that Ingram had left the nuclear gauge unsecured two days before. Ingram was standing nearby and Morrison asked Walton to hand the phone to her. Morrison reiterated the proper procedures for securing the nuclear gauge. After ensuring that Ingram understood the procedures, he informed her that Saturday would be her last day of work. (Tr. 102). Morrison explained that this was a seasonal lay-off and that there were more senior technicians who could perform the work. He testified that Ingram's response to this information was that she "seemed excited and thanked me for making that her last day." (Tr. 102). Morrison's telephone conversation with Ingram ended there as she had passed the phone back to Walton. In the background Morrison could hear Ingram screaming. Walton informed Morrison that Ingram had driven off in the truck.

Walton stood next to Ingram during her telephone conversation with Morrison at the jobsite. Walton testified that Ingram seemed pleased at the end of the conversation, but that after she handed him back the phone that her attitude changed. (Tr. 126). She appeared to be very upset and was screaming obscenities before driving off in the truck.

After Ingram left the worksite, Walton drove to the spot where Ingram had been parking the work truck. (Tr. 128). The truck was there, but Ingram was gone. Walton noticed that the nuclear gauge was in the cab of the truck, not in its container, with the truck unlocked, windows down, and keys in the ignition. Walton removed the gauge from the truck for use in the field. (Tr. 129). He later called Edward Morrison to inform him that Ingram had again left the gauge unsecured.

Complainant's contention is that starting on November 1, 2000, when she left the worksite, she was to be off work due to her back injury. Ingram applied for and received workers' compensation benefits for a period beginning in January of 2001 until June 6, 2001. (Tr. 72). She testified that she had no notice or indication that she would not be employed by either SSI or Mar-Zane when the construction season began again. (Tr. 42). However, Complainant also testified that she thought that she would go back to work as a laborer, not a nuclear gauge technician. (Tr. 53). She explained, "I knew I couldn't go back to the company I quit after I quit them." (Tr. 53).

Edward Morrison testified that when he spoke with Ingram on November 1, 2000, that he informed her that she would be laid off that Saturday. (Tr. 102). The layoff was related to the decrease in work projects due to the coming winter and that there were more senior technicians to perform the work. Morrison stated that Ingram's injury was not a factor in the layoff. Therefore, on November 1, 2000, Morrison's initial intention was that Ingram would work out the week until Saturday and then would be laid off. (Tr. 112). However, when Ingram left the worksite on Wednesday, seemingly upset, Morrison assumed that she had quit. (Tr. 103). He came to this conclusion due to her behavior following the phone call and that she did not work the remainder of the week. He testified that he did not believe that she was taking time off due to her back injury as she never notified him of that intention. (Tr. 112). Furthermore, due to her behavior and the fact that the nuclear gauge had again been left unsecured, Morrison decided that he would not hire Ingram back with Mar-Zane the following spring. (Tr. 103). Morrison contacted Rick Hersberger, who was in charge of hiring laborers for SSI, and informed him that he would no longer require Ingram's services as a nuclear technician and that if Hersberger could use her as a laborer to call her.

According to Morrison's testimony, Ingram was initially to be laid off, but her behavior on the worksite that day lead him to believe that she had quit. He stated that the personnel records treat the events of November 1, 2000 such that Ingram quit her employment with Mar-Zane. Finally, after he heard and was informed of Ingram's behavior and that the nuclear gauge was left unsecured for a third time, he decided that he would no longer employ her for Mar-Zane.

Morrison testified that he had telephone contact with Ingram shortly after November 1, 2000. Ingram had left a

message with Mar-Zane's Indiana office instructing that Morrison return her call as soon as possible. (Tr. 107). Morrison did return the call; however, all Ingram said to Morrison was, "I have nothing to say to you," and hung up the phone. (Tr. 107).

Events between November of 2000 and April 2001

Ingram filed for Workers' Compensation benefits on account of her back injury on November 27, 2000. (Tr. 62, 72, 159; CX 1). Complainant requested information and forms from DaNielle St. Clair, who is the Workers' Compensation Administrator for SSI. (Tr. 155, CX 1). When Complainant received the forms, she mistakenly wrote November 7, 2000 as the date of her injury. (Tr. 61, 160). The mistaken date resulted in SSI's workers' compensation insurance provider performing an investigation. (Tr. 160). During this process, St. Clair had telephone communications with Ingram in which Ingram was "irate" and "yelling" about the dispute with the insurance provider. (Tr. 161). Ingram did receive workers' compensation from January of 2001 until June 6, 2001. (Tr. 72). During this period, she was restricted from lifting more than ten pounds due to her back injury. (Tr. 79). She could have returned to normal work duties, with no lifting restrictions, on June 6, 2001. (Tr. 51).

Complainant testified that prior to April she had many conversations with a former co-worker, Percy Bronson. (Tr. 50). She stated that at least on one occasion in April, Bronson asked if she was ready to go back to work. Specifically, Complainant testified, "He didn't call me and tell me he was hiring me or calling me back to work. He asked me was I ready to go back to work, like the season is going to restart again." (Tr. 50). Bronson denied that he had any conversations with Ingram while she was off work. (Tr. 169). He stated, "As far as me calling her to work, she's working for Mar-Zane. She wasn't working for Shelly & Sands, so I wasn't obligated to call her to work." (Tr. 169). Some time after she allegedly spoke with Bronson in April, Complainant called SSI to inquire as to the availability of work. (Tr. 50). On April 19, 2001, Complainant received a letter from Charles H. Bracken, SSI's Area Manager for Indiana. (EX 10). The letter reads as follows:

> It has come to my attention that we have received numerous angry and threatening phone calls at both our local office in Indianapolis and our Ohio laboratory. We are insisting that these calls cease immediately.

> We have mailed to you everything that we have ever received as far as certificates are concerned. The originals are possibly in the possession of Rieth Riley. We only received copies from Dudley Bonte, not the originals. So as you can see we have never had your originals. You also questioned your status at Shelly & Sands, Inc. and Mar-Zane, at this time there is no position available for you.
>
> If you feel the need to continue to communicate, do so by mail only. As we will no longer tolerate the hostile phone calls we have previously gotten from you.

(EX 10). Complainant perceived this letter as a termination of her employment with SSI and Mar-Zane. (Tr. 55). Complainant believed that SSI did have open positions in April of 2001. (Tr. 71).

In Ingram's initial complaint, she stated that she called Ron Morrison shortly after receiving Bracken's letter. (ALJX 12). During this alleged conversation, Ron Morrison commented that Ingram had reported SSI to the NRC and that she no longer worked for SSI or Mar-Zane. In addition, Complainant asserted in her complaint that Ron Morrison threatened that, "if he could help it [she] would not be able to lay asphalt in the state of Indiana." (ALJX 12). The account of this conversation is not corroborated in any testimony of the Complainant or other witnesses at the hearing.

According to Complainant's testimony, she called SSI after she received Bracken's letter to request the return of the original copies of her various certificates. (Tr. 68). Ingram admitted that these were "angry phone calls" as she could not seek employment without those certificates. Matthew Kelley, who worked directly for Bracken, testified that Bracken's office had been receiving numerous phone calls from Ingram. (Tr. 150). Although Complainant's testimony is contradictory, the letter from Bracken, dated April 17, 2001, suggests that the "angry phone calls" took place before Complainant received the letter.

Two witnesses testified that SSI had no job openings in April of 2001. Matthew Kelly, Operations and Project Manager at the time, testified that SSI was not hiring in April due to lack of projects. (Tr. 151). Rick Hersberger, a supervisor and superintendent of projects, testified that the beginning of the

road construction season was slow and there were no openings. (Tr. 172).

Complainant testified that she has sought employment in the road construction industry since receiving Bracken's letter on April 19, 2001. (Tr. 56). She testified that prior to working for SSI that she had no difficulties acquiring work in that field. (Tr. 55). Complainant contends that she is being blacklisted in this industry in Indiana. (Tr. 56).

Timeliness of Complaint

The timeliness of Complainant's complaint depends on the date of the adverse action which precipitated the claim. Complainant asserts that the letter she received on April 19, 2001 terminating her employment is the adverse employment action in this claim. In the initial complaint, Ingram stated that she received the letter on April 19, 2001. (ALJX 12). Furthermore, in her letter of appeal dated October 31, 2001, she repeats that she received the letter on April 19, 2001. (ALJX 12). At the hearing, Complainant testified that the date of the letter was April 17, 2001, but this was not stated definitively. (Tr. 49). It is unclear from her testimony whether she was stating that the letter was dated on April 17, 2001 or that she received the letter on that date. The letter is dated April 17, 2001. (EX 10). The record contains no evidence of postmark or other evidence of the date on which Complainant received the letter. Presuming that the letter was mailed on April 17, 2001, it seems highly unlikely that Complainant received the letter on the same date. Because the record is inconclusive and Complainant's testimony is not definitive, I credit the statements made in her complaint and appeal letter and find that Complainant received the letter on April 19, 2001.

Complaints under the ERA must be filed within 180 days of the adverse action. 20 C.F.R. § 24.3(b)(2) (2001). Complainant asserts that the letter she received on April 19, 2001 is the adverse employment action in this claim. Ingram filed her complaint with OSHA on October 15, 2001, 179 days after the adverse action. Therefore, her complaint is timely.

OSHA dismissed Ingram's complaint as untimely. However, OSHA used November 1, 2000 as the date of the adverse employment action. This was the date that Complainant was laid off from Mar-Zane. Were Complainant to contend that the November lay-off was the adverse employment action, her claim would be untimely. However, as discussed above, the letter of termination received

on April 19, 2001 is the adverse employment action in this claim and as such the complaint is timely.

Timeliness of Complainant's Appeal

On October 31, 2001, Complainant received a letter from Kenneth Gilbert, Area Director of OSHA in Indianapolis, dismissing her complaint as untimely. The letter stated that she had 15 days to file an appeal of the dismissal to Richard Fairfax, Director of Compliance Programs in Washington, D.C.. Ingram drafted an appeal letter on October 31, 2001 and mailed the letter on November 1, 2001, as evidenced by postmark. The letter was not received by Fairfax until February 22, 2002, possibly due to the extreme mail delays in Washington, D.C., following the September 11, 2001 events and later anthrax scares.

Although Ingram's appeal was timely, her appeal was sent to the incorrect forum. The letter from Gilbert should have instructed Complainant to appeal to the OALJ. This situation was eventually rectified and the file was sent back to the Indianapolis OSHA office for dismissal. Ingram received a letter from Gilbert on June 3, 2002 informing her that her complaint filing was untimely and that any appeals should be made to the OALJ. On June 4, 2002, Complainant drafted her letter of appeal to the OALJ and faxed it to the appropriate party on that date.

A complainant has five working days after notification of a determination to appeal to the OALJ. 29 C.F.R. § 24.4(d)(2)(2001). Complainant received the initial notice of determination on October 31, 2001. Therefore, a timely appeal to the OALJ should have been made on or before November 6, 2001. The Secretary has held that the time period to request a hearing is not jurisdictional and equitable tolling may apply in certain circumstances. *Ward v. Bechtel Construction, Inc.*, 85-ERA-9 (Sec'y July 11, 1986). If the circumstances of this case are such that the principles of equitable estoppel or equitable tolling should apply, then Ingram's appeal to the OALJ will not be dismissed as untimely.

Equitable estoppel is not applicable in this case since that doctrine is applied to suspend the running of a statute of limitations when the defendant has actively prevented the plaintiff from suing. *Singletary v. Continental Illinois Nat'l Bank & Trust Co. of Chicago*, 9 F.3d 1236 (7th Cir. 1993). Here, Complainant's untimely appeal to the OALJ is due to incorrect

instructions from OSHA and not from SSI. Furthermore, the record contains no evidence that SSI actively interfered in Ingram's pursuit of this claim.

Equitable tolling is applicable in this case. The United States Supreme Court has held that equitable tolling is appropriate to excuse an untimely submission when the complainant has received inadequate notice, a motion for appointment of counsel is pending, or "where the court has lead the plaintiff to believe that she had done everything required of her." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 104 S.Ct. 1723, 1726 (1984). The Seventh Circuit has held that equitable tolling "permits a plaintiff to sue after the statute of limitations has expired if through no fault or lack of diligence on his part he was unable to sue before, even though the defendant took no active steps to prevent him from suing." *Donald v. Cook County Sheriff's Dep't*, 95 F.3d 548, 561-62 (1996) (quoting *Singletary v. Continental Illinois Nat'l Bank & Trust Co. of Chicago*, 9 F.3d 1236 (7th Cir. 1993)). Additionally, other courts have held that equitable tolling is appropriate in the following circumstances: (1) the defendant has actively mislead the plaintiff; (2) extraordinary circumstances prevented the plaintiff from exercising his or her rights; or (3) the plaintiff "raised the precise statutory claim and issue but has mistakenly done so in the wrong forum." *School District of Allentown v. Marshall*, 657 F.2d 16, 20 (3d Cir. 1981). *See also Herchak v. America West Airlines, Inc.*, ARB 03-057 (ARB May 14, 2003).

As discussed above, there is no evidence in this case that Respondent actively misled Complainant in the filing of her appeal of the notice of determination. Likewise, there is no evidence of extraordinary circumstances preventing Ingram's action or that a motion for appointment of counsel was pending. However, Complainant relied on the notice sent from OSHA instructing her to send the notice of appeal to the incorrect office, which she did in a timely fashion. Once OSHA realized that it erred in its appeal instructions to Ingram, she was instructed to appeal to the OALJ within five days of the receipt of notice, which she did. Thus, Complainant acted accordingly and timely to the instructions provided to her by OSHA. She was diligent in responding to the received notices.

Mitchell v. EG & G Services, 87-ERA-22 (Sec'y 1993), provides a set of circumstances contrasting with those at hand. The complainant argued that equitable tolling was applicable in his case as he initially filed his complaint in two wrong forums

before filing his complaint with the correct forum after the expiration of the statute of limitations. He also alleged that his delay in filing in the correct forum was due to misinformation from agency personnel. However, the complainant never filed a written complaint which set out the precise statutory claim and issue with either office. He related his employment discrimination concerns over the telephone. The Secretary concluded that because the complainant did not file a written complaint he was precluded from applying that "rationale as a basis for equitable tolling." *Id*.

Here, Complainant filed her complaint with the appropriate office, and as discussed above, did so timely. In addition, her initial notice of appeal was sent to the wrong forum, but was sent timely and in accordance with the statutory regulations.

I find that although Complainant's appeal was untimely filed pursuant to the regulations that equitable tolling applies to excuse the untimely submission. The record provides no evidence that Complainant should have known that the letter she received from OSHA instructing her to send a notice of appeal to the Director of Compliance Programs in Washington, D.C. was in error. She complied with the written instructions and did "everything required of her" by OSHA at that point. *Baldwin County Welcome Center*, 104 S.Ct. at 1726. Furthermore, the record does not indicate any lack of diligence or fault in this appeal. *Donald*, 95 F.3d at 560. Complainant is unrepresented in this action and her reliance on OSHA's instructions was reasonable. When Complainant received the correct appeal instructions from OSHA, she again complied timely. Complainant mistakenly filed her appeal in the incorrect forum based upon representations from OSHA. This is well documented in the record and illustrated in memoranda and letters from OSHA. Complainant did not sit on her rights or fail to take action. I conclude that equitable tolling is appropriate under these circumstances and should be applied. Therefore, although Complainant's appeal was filed with the OALJ more than five days after receiving the initial OSHA Notice of Determination, the untimeliness will be excused.

CONCLUSIONS OF LAW

Elements and Burdens of Proof

The employee protection provisions of the ERA are set forth at 42 U.S.C. § 5851. Subsection (a) proscribes discrimination against employees of ERA governed employers as follows:

> (1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—
>
> (A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954;
>
> (B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;
>
> (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;
>
> (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
>
> (E) testified or is about to testify in any such proceeding or;
>
> (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

42 U.S.C. § 5851(a)(1) (2003).

In addition, the statute sets out the burdens of proof in 42 U.S.C. §5851(b)(3):

> (A) The Secretary shall dismiss a complaint filed under paragraph (1), and shall not conduct the investigation required under paragraph (2), unless the complainant has made a prima facie showing that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.
>
> (B) Notwithstanding a finding by the Secretary that the complainant has made the showing required by subparagraph (A), no investigation required under paragraph (2) shall be conducted if the employer demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior.
>
> (C) The Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.
>
> (D) Relief may not be ordered under paragraph (2) if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.

42 U.S.C. § 5851(b)(3) (2003).

Since Ingram's employment was within the state of Indiana, this case is controlled by the law of the Seventh Federal Circuit. However, there are no Seventh Circuit opinions which address the burdens of proof presented in the post-1992 amendments to the ERA. The two leading cases applying the post-1992 ERA amendments are *Trimmer v. U.S. Department of Labor*, 174 F.3d 1098 (10th Cir. 1999) and *Stone & Webster Engineering Corp.*

v. Herman, 115 F.3d 1568 (11th Cir. 1997). In *Trimmer* and *Stone & Webster*, the burdens appear to be interpreted and applied in the same fashion. The proof burden as stated in Trimmer is as follows:

> The Energy Reorganization Act of 1974 (ERA) prohibits any employer from discharging or otherwise discriminating against any employee "with respect to his compensation, terms, conditions, or privileges of employment" because the employee engaged in protected whistleblowing activity. 42 U.S.C. §5851(a). In 1992 Congress amended §5851 of the ERA to include a burden-shifting framework distinct from the Title VII employment-discrimination burden-shifting framework first established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-05, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See* Energy Policy Act of 1992, Pub.L. No. 102-486, § 2902(d), 106 Stat. 2776, 3123-24 (amending 42 U.S.C. § 5851(b)). Although Congress desired to make it easier for whistleblowers to prevail in their discrimination suits, it was also concerned with stemming frivolous complaints. Consequently, § 5851 contains a gatekeeping function, which provides that the Secretary cannot investigate a complaint unless the complainant has established a prima facie case that his protected behavior was a contributing factor in the unfavorable personnel action alleged in the complaint. *See* § 5851(b)(3)(A). Even if the employee has established a prima facie case, the Secretary cannot investigate the complaint if the employer can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. *See* § 5851(b)(3)(B). Thus, only if the employee establishes a prima facie case and the employer fails to disprove the allegation of discrimination by clear and convincing evidence may the Secretary even investigate the complaint.
>
> If, as here, the case proceeds to a hearing before the Secretary, the complainant must prove the same elements as in the prima facie case, but this time must prove by a preponderance of the evidence that he engaged in protected activity which was a contributing factor in an unfavorable personnel decision. *See* § 5851(b)(3)(C); *see also Dysert v. Secretary of Labor*, 105 F.3d 607, 609-10 (11th Cir. 1997)(holding that Secretary's construction of §5851(b)(3)(C), making complainant's burden preponderance of the evidence, was reasonable). Only if the

> complainant meets his burden does the burden then shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. *See* §5851(b)(3)(D).

Trimmer, 174 F.3d at 1101-02.

Recently, the Administrative Review Board (ARB) addressed the burdens of proof in ERA cases. *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sept. 30, 2003). The ARB's holding in *Kester* is consistent with those in *Trimmer* and *Stone & Webster*. The ARB held that a complainant must demonstrate by a preponderance of the evidence that he or she engaged in a protected activity, that the employer was aware of the protected activity, that the complainant was subject to an adverse employment action, and that complainant's protected activity was a contributing factor in the adverse employment action.[12] *Id*. If the complainant meets this burden, then the employer must demonstrate by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected activity. *Id*. See also *Trimmer*, 174 F.3d at 1101-02; *Stone & Webster*, 115 F.3d at 1572; *Bourland v. Burns Int'l Security Services*, 98-ERA-32 (ARB Apr. 30, 2002).

At this stage of the proceeding, Complainant has the burden to prove the question of ultimate liability by a preponderance of the evidence. *Parker v. Tennessee Valley Auth.*, 1999-ERA-13 (ARB June 27, 2002); *Trimmer*, 174 F.3d at 1101; *Carroll v. Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1996). In *Stone & Webster*, the Tenth Circuit reviewed the evidence of record and affirmed the Secretary's finding that the evidence revealed an inference of causation that the protected activity was a contributing factor in the unfavorable personnel action. *Stone & Webster*,

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[12] In *Marano v. Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993), interpreting the Whistleblower Protection Act, 5 U.S.C. § 1221(e)(1), the Court, interpreting a similar provision, observed:

> The words "a contributing factor"... mean any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule the existing case law, which requires a whistleblower to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to overturn that action.

Marano, 2 F.3d at 1140 (citations omitted).

115 F.3d at 1573-74. In determining whether there was an inference of causation, the Tenth Circuit looked to the evidence presented by the complainant to show this causation and the counter evidence presented by the respondent. *Id.*

If Complainant proves by a preponderance of the evidence the ultimate question of liability, then Respondent has the burden to prove by clear and convincing evidence that it would have taken the same adverse employment action in the absence of the protected activity.

It is contested whether Complainant engaged in a protected activity, whether Respondent was aware of that activity and whether Complainant suffered an adverse employment action. Therefore, I must address these issues before determining if a nexus exists between those actions, if proved.

Protected Activity

To constitute protected activity, an employee's acts must implicate safety definitively and specifically. *American Nuclear Resources v. Department of Labor*, 134 F.3d 1292 (6th Cir. 1998). However, the ERA "does not protect every incidental inquiry or superficial suggestion that somehow, in some way, may possibly implicate a safety concern." *Id.* at 1295 (citing *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1574 (11th Cir. 1997)). Making general inquiries regarding safety issues, however, does not automatically qualify as protected activity. *Id.* Where Complainant's complaint to management "touched on" subjects regulated by the pertinent statutes, the complaint constitutes protected activity. *See Nathaniel v. Westinghouse Hanford Co.*, 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9.

In December of 2000, Complainant called the NRC's toll free number for reporting nuclear safety violations and reported the incident resulting in damage to the nuclear gauge. (Tr. 44). This report led to an NRC investigation into her complaint, although no violations were discovered. This activity received direct protection under Section 5851(a)(1)(D) of the ERA.

Respondent argues that Ingram did not engage in protected activity by reporting the incident to the NRC because she did not have a reasonable and good faith belief that SSI or Mar-Zane was in violation. Complainant had no knowledge of what occurred with the damaged gauge after it was removed from the worksite on July 12, 2000; therefore, Respondent urges her belief was not reasonable.

The ARB has held that under the environmental whistleblower protection provisions that an employee has engaged in a protected activity if he or she made a complaint "grounded in conditions constituting reasonably perceived violations of the environmental acts." *Stephenson v. NASA*, ARB No. 98-025, ALJ No. 1994-TSC-5 (ARB July 18, 2000). I find that Complainant did have a reasonable perception that her employer was violating the ERA. The record contains no evidence to dispute Complainant's assertion that the nuclear gauge was damaged by a motorist. Ingram was aware that in the event of damage to the nuclear gauge that there was a possibility of radiation leakage. (Tr. 75-76). She was also aware that damages needed to be reported to the NRC immediately. The regulations specify that only if radiation in certain measurements is leaked must an incident of damage be reported. Hebestreit testified that when he looked at the damaged gauge that it was in "safe mode" and that he, and any other trained technician, would be able to discern that no reporting was required. (Tr. 142). Complainant testified that she used the previously damaged nuclear gauge in September or October of 2000 and that it was making a "rattling" sound. (Tr. 76). The record contains no information to establish that SSI or Mar-Zane informed Ingram that the gauge had been repaired or that the damage had not required a report to the NRC. The record does support a finding that neither SSI nor Mar-Zane reported the incident to the NRC. Thus, I find Complainant's belief to be reasonable that the damage to the nuclear gauge should have been reported to the NRC and that SSI or Mar-Zane had not reported the incident.

Complainant testified that when Patrick came out to the jobsite to retrieve the damaged nuclear gauge that she informed him that the incident should be reported to the NRC and that if the company did not do so within 90 days that she would report the incident to the NRC. (Tr. 41). The record contains no testimony, affidavits or other evidence to dispute that Complainant made this statement to Patrick. The ERA protects an employee who threatens to report a violation to the NRC. 42 U.S.C. § 5851(a)(1)(D). Patrick was a co-worker of Ingram's and did not hold a supervisory or management position. However, under certain circumstances a safety complaint to a co-worker qualifies as protected activity. *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568 (11th Cir. 1997); *Ferguson v. Weststar, Inc.*, 1999-CAA-9 (ALJ Jan. 27, 2000. I find that Complainant's statement and threat of reporting the incident to the NRC to Patrick qualifies as protected activity.

Respondent's Awareness of Protected Activity

After the nuclear gauge was damaged in July of 2000, Complainant informed Dan Patrick, who retrieved the gauge, that she would report the incident to the NRC if the company had not after 90 days. (Tr. 41). The record contains no evidence to show that Patrick passed this information on to anyone else at SSI or Mar-Zane. Patrick did not hold a supervisory or managerial position at Mar-Zane. Ingram and Edward Morrision testified that Patrick was a "technician," who worked at the asphalt plant. (Tr. 39, 87). The record contains no further description of Patrick's work responsibilities or title. Complainant has failed to demonstrate that Respondent was aware of her threat to report the incident with the nuclear gauge to the NRC.

Complainant did report the nuclear gauge accident on either December 4 or 7, 2000. (Tr. 44). As discussed in the previous section, I find this to be a protected activity.

Complainant must demonstrate that the decision-maker of the adverse employment action must have been aware that she engaged in a protected activity when making the decision. *See Gleason v. Mesirow Financial, Inc.*, 118 F.3d 1134 (7th Cir. 1997); *Adjiri v. Emory University*, 1997-ERA-36 (ARB July 14, 1998). Here, the letter dated April 17, 2001, which Complainant asserts is a termination letter, was sent by Charles Bracken, the Indiana Area Manager at that time. Complainant must demonstrate that Bracken was aware that she made a report to the NRC prior to making the decision in the April letter. The record contains no evidence to show that other personnel were involved in the decision represented in the April 17, 2001 letter.

Complainant submitted a document prepared by DaNielle St. Clair for SSI. (CX 1). The document, typewritten on Mar-Zane letterhead, does not reveal to whom it was addressed or the date the document was created. This document chronicles the events of October 31, 2000 through November 2, 2000 involving Ingram. In addition, the document describes Ingram's contacts with St. Clair regarding workers' compensation. Finally, the document states,

> Ms. Ingram called this office numerous times making a multitude of allegations regarding an incident at work when an automobile hit the nuclear gauge she used on the roadway. She claimed the gauge was damaged and then repaired but should have been

> removed from service. She claimed that the incident caused her to have lumps in her breasts. An investigation was conducted as to what happened and how the gauge was serviced. The gauge was picked up and boxed by other Mar-Zane employees. The nuclear source was found undisturbed and without leakage. The gauge was properly repaired by a certified manufacturer and returned to the job. ***The Nuclear Regulatory Commission conducted an investigation following the complaint lodged by Ms. Ingram.*** No violations with Mar-Zane Inc.'s handling of the equipment were found.

(CX 1) (emphasis added). At the end of the document, the names of those parties to whom the documented was copied are listed. Bracken, Ron Morrison, Edward Morrison, and C. Graham were sent copies. Therefore, this document supports a finding that Bracken had knowledge that Ingram filed a complaint with the NRC. However, the document does not establish when Bracken received this information. As stated above, the document is not dated. This document may have been prepared for litigation purposes after Complainant filed her employment discrimination complaint. Thus, although the document establishes that Bracken had knowledge of Ingram's complaint to the NRC, it does not demonstrate his awareness prior to his drafting of the April 17, 2001 letter to Ingram.

In sum, I find that Complainant has failed to establish that Bracken, the decision-maker in the April 17, 2001 letter, was aware that she made a report to the NRC prior to drafting the letter.

Adverse Employment Action

An adverse employment action is "simply something unpleasant, detrimental, even unfortunate, but not necessarily (and not usually) discriminatory." *Stone & Webster Engineering,* 115 F.3d 1568, 1573 (11th Cir. 1997). The Seventh Circuit has held that an employment action may be adverse whether or not the person subject to that action suffers a monetary loss. *Smart v. Ball State University*, 89 F.3d 437, 441 (7th Cir. 1996). Termination, demotion or a loss in benefits are common examples of adverse employment actions. *Savino v. C.P. Hall Co.*, 199 F.3d 925, 932 n. 8 (7th Cir. 1999); *Teymer v. Kraft Foods North America, Inc.*, 37 Fed. Appx. 206, 212 (7th Cir. 2002).

The ARB and the Secretary have determined that failure to hire or rehire constitute an adverse employment action. *Holtzclaw v. Commonwealth of Kentucky Natural Resources and Envt'l Portection Cabinet*, 95-CAA-7 (ARB Fe. 13, 1997); *Artrip v. Ebasco Services, Inc.*, 89-ERA-23 (Sec'y Mar. 21, 1995). In order to demonstrate that failure to hire or re-hire was an adverse employment action, the individual must demonstrate that he or she: (1) was qualified for the position; (2) applied for the position; (3) was rejected for the position; and (4) the employer continued to seek applicants for the vacant position or the position was filled by someone belonging to an unprotected class. *Holtzclaw*, 95-CAA-7; *Samodurov v. General Physics Corp.*, 89-ERA-20 (Sec'y Nov. 16, 1993). *See also Loyd v. Phillips Bros.*, 25 F.3d 518, 523 (7th Cir. 1994).

The record supports a finding that Complainant was qualified to work as either a technician engaged in testing the density and compaction of asphalt or as a laborer for both SSI and Mar-Zane. Complainant had worked in both capacities for both companies. However, in April of 2001, Complainant was physically restricted from lifting more than ten pounds due to her back injury. The record establishes that the nuclear gauge weighed between thirty and forty pounds. (Tr. 90, 122). Therefore, it seems Complainant would not have been able to use the nuclear gauge. The record contains no evidence that SSI had openings in April of 2001 that did not require lifting more than ten pounds. Thus, Complainant may not have been qualified for any positions open in April of 2001.

However, the record does not support a finding that any positions were open at the time Complainant received the "termination" letter or that Complainant applied for a position. She testified that prior to receiving the letter on April 19, 2001 that she called to inquire whether there was work available. She stated, "I didn't call for a job. I called to see when I would be able to go back to work." (Tr. 50). The relevant portion of the letter Ingram received from SSI states, "You also questioned your status at Shelly & Sands, Inc. and Mar-Zane, ***at this time there is no position available for you***." (EX 10) (emphasis added).

The letter does not explicitly state that Complainant was ineligible for future employment, but states that no work was available for her at that time. This statement was affirmed by the testimony of Rick Hersberger, a Supervisor and Project Superintendent for SSI, and Matthew Kelley, the Area Manager for

Indiana for SSI, who both stated that there were no open positions in April of 2001. (Tr. 151, 172).

Complainant offers no evidence, other than a statement of her own belief, that SSI had job openings in April of 2001. She does not refer to a specific opening or that others were being hired while she was not. I find that the evidence does not support a finding that there was a job opening in April of 2001. Therefore, if there were no openings, then there can be no failure to re-hire and no adverse employment action.

Complainant also asserts that she has been blacklisted by SSI in the asphalt industry in Indiana. The ARB recently addressed blacklisting in *Pickett v. Tennessee Valley Authority*, ARB Nos. 02-056 and 02-059, ALJ No. 2001-CAA-18 (ARB Nov. 28, 2003). A blacklist was defined as "a list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate." *Pickett*, slip op. at 8. The ARB further described this process as the dissemination of "damaging information that affirmatively prevents another person from finding employment." *Id.* In order to prove that the existence of blacklisting, a complainant must provide direct or circumstantial evidence that a specific act of blacklisting occurred. *Id.*

Complainant testified that prior to working for SSI, she never had difficulties finding employment in road construction. (Tr. 56). However, Complainant has not been able to find work in that industry since her employment ended with SSI. Her testimony suggested a belief that she is being blacklisted. She offers no specific acts or evidence to support this allegation. Complainant is merely speculating that she is being blacklisted by SSI. As Complainant has not provided evidence of specific acts of blacklisting or any evidence in support, I cannot find that Complainant is a victim of blacklisting.

In sum, Complainant has failed to establish that SSI had job openings in April of 2001 for which she was rejected and that she was a victim of blacklisting. As a result, Complainant has failed to demonstrate by a preponderance of the evidence that she suffered an adverse employment action. Complainant has failed to demonstrate one of the elements of her *prima facie* case by a preponderance of the evidence.

In conclusion, Complainant has proven by a preponderance of the evidence that she engaged in protected activity under the Act. However, Complainant has failed to demonstrate that the

decision-maker of the April 17, 2001 letter was aware of her protected activity prior to drafting that letter and has failed to demonstrate that she suffered an adverse action. As Complainant has failed to establish these elements of her *prima facie* case, she cannot demonstrate a nexus between the protected activity and the adverse action. Accordingly, this claim must be denied.

Employer's Burden of Proof

Even if Complainant had established a prima facie case of employment discrimination, Employer has demonstrated by clear and convincing evidence that there is no nexus between Complainant's protected activity and the adverse employment action. Employer has established that Complainant's layoff in November of 2000 was due to a decrease in available work. In addition, Employer has demonstrated that Edward Morrison decided not to re-employ Ingram for Mar-Zane due to her behavior after hearing of the layoff. Employer has shown that these activities took place prior to Ingram's report to the NRC.

Furthermore, Employer has shown through the testimony of its witnesses that work was unavailable in April of 2001 as the road construction season had not begun in earnest at that time. Employer demonstrated that Complainant was not offered work in April of 2001 as there was no work available. In addition, Employer has established that Complainant had filed a workers' compensation claim due to her back injury and was temporarily totally disabled from January 9, 2001 until June 6, 2001. Thus, Employer has shown that even if work were available in April of 2001, Complainant would not have been able to work for two more months. Thus, Employer has established by clear and convincing evidence that Complainant's protected activity was not a factor in any alleged adverse employment action.

CONCLUSION

It is my conclusion that Rhonda L. Ingram was not disciplined or discriminated against for any activities protected by the Act.

RECOMMENDED ORDER

I recommend that Rhonda L. Ingram's claim for relief under the Employee Protection Provisions of the ERA be DENIED.

A

Rudolf L. Jansen
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§ 24.8 and 24.9 as amended by 63 Fed. Reg. 6614 (1998).